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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ANNE HEITING, an individual

Plaintiff,

V.

**FKA DISTRIBUTING CO., a
California company, DOES 1
through 25, inclusive**

Defendant.

Case No. 2:24-cv-07314-HDV-AGR

**DEFENDANT FKA DISTRIBUTING
CO.'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF ITS MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED
COMPLAINT**

[Notice of Motion and Motion to Dismiss filed concurrently]

Judge: Hon. Hernan D. Vera

Date: April 24, 2025

Time: 10:00 AM

Location: First Street Courthouse,
350 W. 1st Street, Courtroom 5B,
5th Floor, Los Angeles, CA
90012

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1 Plaintiff Anne Heiting (“Plaintiff” or “Heiting”) brings this putative class
2 action alleging that Defendant FKA Distributing Co. (“Defendant”), a Michigan
3 company¹, violated California’s Trap and Trace Law, codified in California Penal
4 Code § 638.51, by using TikTok’s tracking software on its website. Plaintiff
5 previously filed a First Amended Complaint (FAC), which this Court dismissed for
6 lack of standing, and now attempts to cure the deficiencies in her Second Amended
7 Complaint (SAC). However, despite Plaintiff’s attempts to add additional
8 allegations, the SAC still fails to establish standing under Article III of the U.S.
9 Constitution, fails to plausibly allege personal jurisdiction by showing that
10 Defendant purposefully directed its conduct at California, and is further barred by
11 Plaintiff’s consent to Defendant’s data collection practices. Accordingly, the SAC
12 should be dismissed with prejudice.

13 **I. LEGAL STANDARDS**

14 **A. Dismissal Under Rule 12 (b)(2) – Lack of Personal Jurisdiction**

15 A court must dismiss a complaint under Fed. R. Civ. P. 12(b)(2) if the plaintiff
16 fails to establish that the court has personal jurisdiction over the defendant. To
17 establish personal jurisdiction, a plaintiff must demonstrate that the defendant has
18 sufficient minimum contacts with the forum state such that the exercise of
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27 ¹ As Plaintiff correctly now identifies in the Second Amended Complaint, Defendant
28 is a Michigan corporation. (Second Amended Complaint at ¶5).

jurisdiction does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Personal jurisdiction may be either general or specific. General jurisdiction exists where the defendant's affiliations with the forum state are so continuous and systematic as to render it essentially at home there. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). Specific jurisdiction requires that the defendant purposefully directed its conduct at the forum state and that the claim arises out of or relates to the defendant's contacts with the forum. *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014); *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021).

A plaintiff must show that the defendant "deliberately reached out beyond [its] home—by, for example, exploiting a market in the forum State or entering a contractual relationship centered there." *Yamashita v. LG Chem, Ltd.*, 62 F.4th 496, 503 (9th Cir. 2023). "[U]nilateral activity of another party or a third person" does not suffice. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L.Ed.2d 404 (1984).

Courts have consistently held that the operation of a website accessible nationwide, without more, is insufficient to establish personal jurisdiction. *See Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1091 (9th Cir. 2023) (Applying the "effects" test derived from *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L.Ed.2d 804 (1984)). A plaintiff must show that the defendant purposefully targeted the forum state, not merely that the website was accessible there. *See Muto*

1 v. *Fenix Int'l Ltd.*, No. 5:22-CV-02164-SSS-DTBX, 2024 WL 2148734, at *11
2 (C.D. Cal. May 2, 2024).

3 **B. Dismissal Under Rule 12 (b)(1) – Lack of Standing**

4 A federal court must dismiss a complaint under Rule 12(b)(1) if the plaintiff
5 lacks standing to bring the claim. To establish standing, a plaintiff must demonstrate
6 (1) an injury-in-fact that is concrete, particularized, and actual or imminent, (2) a
7 causal connection between the injury and the defendant's conduct, and (3) that the
8 injury is redressable by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504
9 U.S. 555, 560 (1992). The Supreme Court has held that a plaintiff cannot establish
10 standing merely by alleging a statutory violation; rather, she must allege a concrete
11 injury that resulted from the alleged violation. *Spokeo, Inc. v. Robins*, 578 U.S. 330,
12 341 (2016); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 426 (2021).

13 **C. Dismissal Under Rule 12 (b)(6) – Failure to State a Claim**

14 A complaint must be dismissed under Rule 12(b)(6) if it fails to state a claim
15 upon which relief can be granted. To survive a motion to dismiss, a complaint must
16 contain sufficient factual matter, accepted as true, to state a claim that is plausible
17 on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is only plausible if
18 it provides sufficient factual content to allow the court to infer that the defendant is
19 liable for the misconduct alleged. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
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1 (2007). Mere conclusory allegations or legal conclusions couched as factual
2 allegations are not sufficient to survive dismissal. *Iqbal*, 556 U.S. at 678.

3 **II. ARGUMENT**
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5 **A. Plaintiff Fails to Allege that Defendant Purposefully Directed Its
6 Conduct at California**

7 To establish a claim under California Penal Code § 638.51, Plaintiff must
8 show that Defendant, a Michigan company, purposefully directed its conduct at
9 California residents. Courts even if it allows the sale of products in California, have
10 consistently held that the operation of a website accessible nationwide, without
11 more, is insufficient to establish personal jurisdiction or to show that a defendant's
12 conduct was expressly aimed at California.
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14 This principle was reaffirmed in *Conohan v. Gen. Digit. Inc.*, 2025 U.S. Dist.
15 LEXIS 29803, at *4 (C.D. Cal. Feb. 19, 2025), where the same plaintiffs' firm
16 brought nearly identical claims under § 638.51. The court dismissed the case because
17 the plaintiff failed to establish that the defendant purposefully directed its conduct at
18 California. The court cited *Walden v. Fiore*, 571 U.S. 277, 290 (2014), emphasizing
19 that the relationship among the defendant, the forum, and the litigation must be
20 meaningful and not based solely on the fortuitous presence of a plaintiff in the forum.
21

22 Additionally, in *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1091
23 (9th Cir. 2023), the Ninth Circuit reiterated that "operation of an interactive website
24 does not, by itself, establish express aiming." Otherwise, any seller offering products
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1 through an interactive website would be subject to jurisdiction in every state where
2 the website is accessible. This is precisely the flaw in Plaintiff's theory here. The
3 court further noted the impracticality of basing jurisdiction on sales, explaining that
4 “[i]f one sale were not enough to establish that a defendant expressly aimed its
5 conduct at a forum, we would face the difficult question of how many sales would
6 suffice. The same challenges would exist if we were to attempt to craft a rule based
7 on sales to the forum as a percentage of a defendant’s total sales.” *Id.* at 1095.
8 Defendant’s activities, like those in *Herbal Brands*, amount to nothing more than
9 operating a website accessible to California residents, with no deliberate effort to
10 cultivate a California-specific market, and therefore do not support the exercise of
11 personal jurisdiction.

12 The court in *Heiting v. Marriott Int'l, Inc.*, 743 F. Supp. 3d 1163, 1171-1172
13 (C.D. Cal. 2024), a case also brought by the Plaintiff in this case and Plaintiff’s
14 counsel, further held that the operation of a website with tracking software does not
15 constitute conduct purposefully directed at California unless the defendant’s website
16 specifically targeted California residents. Plaintiff’s allegations here are
17 indistinguishable from those rejected in *Heiting*. “[T]he law is clear that a defendant
18 cannot be sued in any forum where its website is visible, and because Heiting has
19 not shown that [Defendant] operated its website in a manner that specifically
20 targeted California, the Court holds that Heiting has failed to establish that
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1 [Defendant] expressly aimed its actions at the forum, making the exercise of specific
2 personal jurisdiction inappropriate.” *Id.*

3 The same reasoning applies here. Plaintiff fails to allege any facts showing
4 that Defendant operated its website to specifically target California users or that the
5 tracking software functioned any differently in California than in any other state.
6 Courts have rejected such jurisdictional arguments in multiple cases, including
7 *Sacco v. Mouseflow, Inc.*, No. 2:20-cv-02330-TLN-KJN, 2022 WL 4663361 (E.D.
8 Cal. Sept. 30, 2022), where the court ruled that tracking software operating
9 nationwide, without additional forum-specific targeting, was insufficient to establish
10 purposeful direction.

11 Similarly, in *Muto v. Fenix Int'l Ltd.*, No. 5:22-CV-02164-SSS-DBX, 2024
12 WL 2148734, at *4 (C.D. Cal. May 2, 2024), the court rejected a claim asserting that
13 a website’s operation alone was enough to establish jurisdiction, holding that
14 plaintiff must show that the website had a forum-specific focus or that the defendant
15 exhibited an intent to cultivate an audience in the forum. Plaintiff here makes no
16 such showing.

17 Because Plaintiff’s claim rests entirely on Defendant’s general website
18 operations—without any allegations of forum-specific conduct—the SAC should be
19 dismissed under Rule 12(b)(2).

B. Plaintiff Lacks Standing Because She Fails to Allege a Concrete Injury

To establish Article III standing, a “plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo v. Robins*, 578 U.S. 330, 338 (2016). A plaintiff establishes an injury in fact when she shows that she suffered “an invasion of a legally protected interest” that is “concrete and particularized.” *Id.* at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)) (“For an injury to be ‘particularized,’ it ‘must affect the plaintiff in a personal and individual way.’”). At the pleading stage, the plaintiff bears the burden of “clearly . . . alleg[ing] facts demonstrating” each element. *Spokeo*, 578 U.S. at 338 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

Bare statutory violations are insufficient to establish injury in fact. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 426 (2021) confirmed that “[o]nly those plaintiffs who have been concretely harmed by a defendant’s statutory violation may sue that private defendant over that violation in federal court.” *Spokeo*, 578 U.S. at 341, similarly held that “Article III standing requires a concrete injury even in the context of a statutory violation.” Thus, to establish standing under California Penal Code § 638.51, Plaintiff must allege a concrete and particularized injury. *See Rodriguez v. Fountain9, Inc.*, No. 24-ST-CV-04504, 2024 WL 3886811, at 4 (Cal. Super. July 9, 2024).

1 Plaintiff has failed to meet this burden. In *Hughes v. Vivint, Inc.*, No. CV 24-
2 3081-GW-KSX, 2024 WL 5179916, at *4-5 (C.D. Cal. July 12, 2024), the court
3 dismissed a nearly identical § 638.51 claim because the plaintiff “does not clearly
4 allege what personalized information of hers was actually collected [and] does not
5 identify any harm to her privacy.” Here, Plaintiff’s allegations remain similarly
6 deficient. Plaintiff has amended the SAC to now include conclusory assertions that
7 tracking occurs “automatically and instantaneously” and applies “regardless of
8 whether or not the individual has a TikTok account.” (SAC at ¶¶ 12 and 14).
9 However, these additions do not address the fundamental deficiency—Plaintiff still
10 does not allege any specific harm resulting from Defendant’s alleged tracking.
11

12 The Ninth Circuit has made clear that claims under privacy statutes must
13 include allegations of actual harm to establish standing. In *In re Facebook, Inc.*
14 *Internet Tracking Litig.*, 956 F.3d 589, 598 (9th Cir. 2020), the court that
15 *TransUnion* requires courts to determine whether a concrete harm exists. Plaintiff
16 here fails to allege any facts showing that she suffered a tangible injury, such as
17 identity theft, financial loss, reputational harm, or even an emotional distress claim
18 linked to data misuse. 594 U.S. 413, 426 (2021).

19 Moreover, Plaintiff’s claim mirrors those dismissed in *Shah v. Fandom, Inc.*,
20 No. 24-CV-01062-RFL, 2024 WL 4539577, at 5 (N.D. Cal. Oct. 21, 2024) and
21 *Mirmalek v. Los Angeles Times Commc’ns LLC*, No. 24-CV-01797-CRB, 2024 WL
22 5102709, at *4 (N.D. Cal. Dec. 12, 2024), where the courts found that allegations of
23

1 mere data collection, without allegations that the data was used in a harmful way,
2 failed to establish standing.

3 Finally, Plaintiff does not allege that she was de-anonymized, that her data
4 was used to identify her personally, or that she suffered any injury beyond the
5 theoretical risk of data collection. As has been previously ruled in this matter, a
6 plaintiff who merely alleges that she “visited Defendant’s Website” and speculates
7 about the possible use of her data without articulating a concrete injury does not
8 satisfy the standing requirement. Order on Motion to Dismiss, Dkt. No. 29, at 6-7
9 (C.D. Cal. Feb. 3, 2025).

10 Thus, Plaintiff’s additions in the SAC—assertions that tracking occurs
11 “instantaneously” and “regardless of whether or not the individual has a TikTok
12 account”—do nothing to cure the fundamental deficiency. Specifically, as found by
13 the court in *Hughes* “[i]f Plaintiff does not have a TikTok account, then the
14 fingerprinting process would not produce any match, meaning Plaintiff’s identity
15 would not be connected with the anonymous information, and seemingly no harm
16 would have occurred. 2024 WL 5179916, at *5 (C.D. Cal. July 12, 2024), *adopted*,
17 No. CV 24-3081-GW-KSX, 2024 WL 5179917 (C.D. Cal. Aug. 5, 2024). Plaintiff
18 must allege a specific, concrete injury resulting from Defendant’s alleged conduct,
19 and she has failed to do so. The SAC should therefore be dismissed under Rule
20 12(b)(1).

1 Plaintiff fails to establish Article III standing because she does not allege any
2 actual, concrete harm resulting from Defendant's alleged use of TikTok tracking
3 software. Courts have consistently held that the mere collection of data, absent any
4 misuse or harm, does not establish standing. Leading the court in *Hughes*, 2024 WL
5 5179916, to dismiss a nearly identical § 638.51 claim where the plaintiff failed to
6 allege how the collected data harmed her. Similarly, Plaintiff here does not allege
7 that her identity was de-anonymized, that her information was misused, or that she
8 suffered any tangible harm from Defendant's alleged data collection.

11 **C. Sensitive or Personally Identifiable Data Was Not Collected**

12 *Griffith* confirms that not all data collection constitutes a violation of privacy
13 laws. 5:23-CV-00964-SB-E, 2024 WL 5279224 (C.D. Cal. Dec. 24, 2024). Notably,
14 in *Griffith*, discovery was conducted, and the issue was the same TikTok Pixel at
15 issue here. Despite this, no personally identifiable information was found to have
16 been transmitted. This further underscores that Plaintiff's speculative claims cannot
17 withstand scrutiny and that dismissal is warranted. The court in *Griffith* granted
18 summary judgment because plaintiffs failed to provide any evidence that TikTok's
19 use of its Pixel was tracking collected private or personally identifiable information,
20 distinguishing it from cases where highly sensitive data was misused. *Griffith*, 2024
21 WL 5279224, at 8-9.

22 Here, Plaintiff makes generalized claims about Defendant's data collection
23 without identifying any specific, sensitive, or personally identifiable information

1 that Defendant obtained. This omission is critical as courts have repeatedly rejected
2 privacy claims where plaintiffs fail to articulate what, if any, private data was
3 actually intercepted. *See In re Zynga Priv. Litig.*, 750 F.3d 1098, 1106 (9th Cir. 2014)
4 (holding that metadata and transactional information do not constitute “contents” of
5 a communication for privacy law purposes).

6
7 Plaintiff has not alleged that Defendant collected any sensitive or personally
8 identifiable information, which is fatal to her claim. Accordingly, Plaintiff’s claims
9 should be dismissed under Rule 12(b)(6).

10
11 **III. CONCLUSION**
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13 For the foregoing reasons, Homedics respectfully requests that the Court grant
14 this Motion and dismiss Plaintiff’s Second Amended Class Action Complaint in its
15 entirety with prejudice. Plaintiff has failed to state a claim upon which relief can be
16 granted, and any amendment would be futile.

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1 DATED: March 6, 2025

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17 **CERTIFICATE OF COMPLIANCE**

18 The undersigned, counsel of record for Defendant FKA Distributing Co.,
19 certifies that this brief contains 2479 words, which complies with the word limit of
20 L.R. 11-6.1

21 By: /s/ Mark A. Cantor
22 Mark A. Cantor (*Pro Hac Vice*)